Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-4–01 OF 2019 (B)
ZAWAWI SALLEH, VERNON ONG, ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND ZABARIAH YUSOF FCJJ
20 JULY 2020

Companies and Corporations — Liquidators — Sanction of liquidator — Whether liquidator had power in law to grant sanction having retrospective effect — Contributory of wound-up company instructed solicitor to file notice of appeal against Court decision affecting company within timeframe prescribed for filing of appeal — Liquidator's sanction to filing notice of appeal only came 42 days later — Sanction stated that it was effective retrospectively from one day before notice of appeal was filed — Whether nothing in law permitted liquidator to grant sanction having retrospective effect — Whether notice of appeal was accordingly void ab initio for being filed without liquidator's sanction at the time it was filed

While a civil suit brought by the respondent against the appellants was pending trial in the High Court, the respondent was wound up by order of court and the official receiver was appointed as its liquidator. The liquidator granted sanction to the respondent's contributory and its solicitors to continue to prosecute the suit against the appellants. The High Court eventually dismissed the respondent's claim. Acting on the contributory's instructions, the solicitors filed a notice of appeal against the decision to the Court of Appeal ('COA') and simultaneously applied to the liquidator to sanction both the filing and prosecution of the appeal. The liquidator's sanction only came 42 days later but the sanction was stated to be effective retrospectively from a day before the notice of appeal was filed. Contending that the liquidator had no power in law to issue such a retrospective sanction, the appellants applied to strike out the notice of appeal. The COA dismissed the application holding, inter alia, that the liquidator did have authority to grant a sanction having retrospective effect because even if an application had instead been made to the COA to retrospectively validate the notice of appeal, it would have been given as a matter of course. The appellants were granted leave to file the instant appeal against the COA's decision, inter alia, on the question whether a liquidator's retrospective sanction was sufficient in itself to give a wound-up company and/or its solicitors the locus standi to appeal against a judgment or order affecting the company.

Held, allowing the appeal and setting aside the COA's decision:

(1) The respondent did not have the locus standi when it filed the notice of appeal. The sanction given by the liquidator could not have retrospective effect. The liquidator did not have the statutory power to grant retrospective sanction in the absence of any express enabling provision in the law. Consequently, the notice of appeal filed by the respondent was bad in law and had no legal effect (see para 35).

(2) The filing of the notice of appeal in the High Court was made pursuant to the Rules of the Court of Appeal so that the High Court judge was made aware that an appeal had been lodged against his decision. The act of filing the notice in the High Court had no consequence on the regularity or otherwise of the appeal. At any rate, the original sanction of the liquidator was confined to the suit in the High Court and it did not include an appeal therefrom. The appeal was brought in the COA and not in the High Court. By the time the appeal was lodged, the action in the High Court had already been disposed of, which was why fresh sanction had to be obtained in respect of the appeal (see para 36).

[Bahasa Malaysia summary

Apabila satu guaman sivil dibawa oleh responden terhadap perayu yang belum diputuskan di Mahkamah Tinggi, responden telah digulung oleh perintah mahkamah dan pegawai penerima telah dilantik sebagai penyelesainya. Penyelesai telah memberikan sanksi kepada penyumbang responden dan peguamnya untuk meneruskan guaman tersebut terhadap perayu. Mahkamah Tinggi akhirnya menolak tuntutan responden. Bertindak atas arahan penyumbangnya, peguam telah memfailkan notis rayuan terhadap keputusan tersebut ke Mahkamah Rayuan ('MR') dan secara serentak memohon kepada penyelesai sanksi untuk pemfailan notis rayuan dan pengendalian rayuan tersebut. Sanksi penyelesai hanya datang 42 hari kemudian akan tetapi sanksi tersebut mengatakan bahawa ianya berkuatkuasa secara kebelakang ke tarikh sehari sebelum notis rayuan difailkan. Dengan menghujahkan bahawa penyelesai tiada kuasa di sisi undang-undang untuk mengeluarkan sanksi yang kebelakang, perayu memohon untuk membatalkan notis rayuan tersebut. MR mengetepikan permohonan tersebut dan memutuskan, antaranya, penyelesai mempunyai otoriti untuk memberikan sanksi yang mempunyai kesan kebelakang kerana walaupun satu permohonan telah dibuat ke MR untuk secara kebelakang membatalkan notis rayuan, ianya akan diberikan. Perayu telah diberikan izin untuk memfailkan rayuan ini terhadap keputusan MR, antaranya atas persoalan sama ada sanksi kebelakang penyelesai adalah dengan sendirinya memadai untuk membenarkan satu syarikat yang telah digulung dan/atau peguamnya locus standi untuk merayu terhadap penghakiman atau perintah yang memberi kesan kepada syarikat.

Diputuskan, membenarkan rayuan dan mengetepikan rayuan MR:

(1) Responden tidak mempunyai locus standi apabila ia memfailkan notis rayuan. Sanksi yang diberikan oleh penyelesai tidak boleh mempunyai kesan kebelakang. Penyelesai tidak mempunyai kuasa statutori untuk memberikan sanksi yang bertindak kebelakang dalam ketiadaan apa-apa peruntukan dalam undang-undang. Oleh itu, notis rayuan yang difailkan oleh responden adalah tidak sah di sisi undang-undang dan tidak mempunyai apa-apa kesan undang-undang (lihat perenggan 35).

(2) Responden tidak mempunyai locus standi apabila ia memfailkan notis rayuan. Sanksi yang diberikan oleh penyelesai tidak boleh mempunyai kesan kebelakang. Penyelesai tidak mempunyai kuasa statutori untuk memberikan sanksi yang bertindak kebelakang dalam ketiadaan apa-apa peruntukan dalam undang-undang. Oleh itu, notis rayuan yang difailkan oleh responden adalah tidak sah di sisi undang-undang dan tidak mempunyai apa-apa kesan undang-undang (lihat perenggan 36).]

Cases referred to

Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd [2013] 1 MLJ 406, CA (refd)

Reebok (M) Sdn Bhd v CIMB Bank Bhd [2018] MLJU 1116; [2018] 1 LNS 1186, CA (refd)

Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors [2017] 6 MLJ 116, CA (refd)

Saunders (a bankrupt); Re Bearman (a bankrupt), Re [1997] 3 All ER 992; [1997] Ch 60, Ch D (refd)

Tan Wee Hun v Inchape Equatron (M) Sdn Bhd [1998] 5 CLJ 769, HC (refd)

Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd [2014] 3 MLJ 1; [2014] 2 CLJ 1, FC (refd)

Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 226(3), 233(1), (2), 236, (1)(e), (2), (2)(a), (3), 279

Companies Act 2016 ss 471(1), 483, 486, 486(1), Twelfth Schedule, Part 1, para (a)

Courts of Judicature Act 1964 s 68

Insolvency Act 1967 s 38(1)(a)

Insolvency Act 1986 [UK] s 285(3)

Appeal from: Civil Appeal No B-02(NCVC)(W)-3–01 of 2018 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Justin Voon, Chiam Jia Yann and Marcus Lee with him) (Justin Voon Chooi & Wing) for the sppellant.

Gabriel Daniel (Melissa Chan Shyuk Wern with him) (Paul Ong & Assoc) for the respondent.

Vernon Ong FCJ:

INTRODUCTION

[1] The facts giving rise to this appeal are relatively straightforward. In 2013, the plaintiff, a private limited company initiated a suit against the defendants at the High Court; the defendants filed a counterclaim against the plaintiff company. While the suit was ongoing, the plaintiff was wound up by an order of the winding-up court on 1 September 2015; the official receiver was appointed as the liquidator of the plaintiff company.

[2] On 18 January 2016, the liquidator gave sanction to the plaintiff's contributory and its solicitors to proceed with the suit in the High Court against the defendants. On 28 November 2017, the High Court dismissed the claims by both parties.

[3] Acting on instructions of the contributory, the solicitors filed a notice of appeal on *22 December 2017*. On even date, the solicitors acting on the instructions of the contributory, also applied to the liquidator for sanction to file the notice of appeal and to proceed with the appeal in the Court of Appeal. On *2 February 2018*, the liquidator gave its sanction, which sanction was stated to take effect retrospectively from *21 December 2017*.

[4] The defendants took issue with the validity of the retrospective sanction and filed a motion to strike out the plaintiff's appeal at the Court of Appeal. It was contended that 'retrospective sanction' cannot be validly given in law and that the Court of Appeal did not grant any leave *nunc pro tunc*. The Court of Appeal dismissed the defendants' motion for striking out and the defendants obtained leave to appeal to the Federal Court on the following questions of law:

Question 1

Whether retrospective sanction from the official receiver/liquidator of a wound-up appellant/applicant in court by itself can sufficiently clothe the appellant and/or their solicitors with locus standi to proceed with the appeal/proceeding in question without leave *nunc pro tunc* obtained from the court?

Question 2

If the answer to Question 1 is NO, whether the application for leave *nun pro tunc* to the court must be made by way of a formal application pursuant to section 486(2) of the Companies Act 2016?

[5] After reading the written submissions and hearing of oral submissions of counsel for the defendants and plaintiff, we answered question 1 in the negative. We declined to answer question 2 as the issue contained therein did not arise within the factual matrix of this appeal. Consequently, we allowed the appeal with costs and set aside the order of the Court of Appeal. We now set out the reasons for our decision.

FINDINGS OF THE COURT OF APPEAL

[6] The key findings of the Court of Appeal for holding that the steps taken and the sanction secured by the plaintiff were proper and valid may be summarised as follows:

(a) the official receiver as the liquidator of the plaintiff company has the necessary authority to consider and grant a sanction which is effective on a date other than the date it was made;

(b) unlike s 68 of the Courts of Judicature Act 1964 ('the CJA 1964') where no appeal may be brought in certain matters unless there is leave from the Court of Appeal, s 483 and/or 486 of the Companies Act 2016 read together with Part I of the Twelfth Schedule or otherwise, do not contain the same prohibitory terms. This suggests that these provisions are more directory in nature as opposed to the mandatory terms of the CJA and the Court of Appeal Rules;

(c) if an application for retrospective leave or leave *nunc pro tunc* may be sought from the court and the court may, in appropriate circumstances, grant such leave or sanction, there is no reason why the liquidator, may not likewise do the same (*Re Saunders (a bankrupt); Re Bearman (a bankrupt)* [1997] 3 All ER 992; [1997] Ch 60);

(d) since the official receiver has seen it fit, after it has been appropriately satisfied and has imposed conditions, to grant the sanction sought retrospectively to the date of the notice of appeal, and it is an authority which it has, the Court of Appeal sees no reason why the Court of Appeal should question that decision;

(e) unlike the factual matrix of the cases cited where the issue of prejudice and miscarriage of justice did not arise because of the applicant's own conduct, failure and dereliction in compliance with the law, the Court of Appeal does not see any presented in this appeal;

(f) had there been an application for retrospective leave or leave *nunc pro tunc* sought by the plaintiff, the Court of Appeal would have granted it unhesitatingly;

(g) agreed with *Reebok (M) Sdn Bhd v CIMB Bank Bhd* [2018] MLJU 1116; [2018] 1 LNS 1186 (CA); and

(h) distinguished *Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd* [2014] 3 MLJ 1; [2014] 2 CLJ 1 (FC), *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406 (CA), *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 (FC) and *Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors* [2017] 6 MLJ 116 (CA).

THE DEFENDANT/APPELLANTS' SUBMISSION

[7] Learned counsel for the defendants/appellants argued that the Court of Appeal in *Hup Lee* had categorically stated that there is no law authorising the liquidator to grant sanction retrospectively. *Hup Lee* was endorsed by the Federal Court in *Winstech* where it held that the sanction granted under s 236(2)(a) of the Companies Act 1965 ('the 1965 Act') to bring or defend any action or other legal proceedings in the name or on behalf of the company does not have a retrospective effect. Section 236(2)(a) of the 1965 Act is equivalent to s 486(1) read with Part 1(a) of the Twelfth Schedule of the Companies Act 2016 ('the 2016 Act').

[8] In this case, the application to court for leave *nunc pro tunc* is a non-issue because it only arises if and when the liquidator has refused to grant sanction. In this case, the plaintiff filed the notice of appeal without the liquidator's sanction and as such the notice of appeal is void ab initio. The Court of Appeal wrongly criticised the defendants' reliance on *Hup Lee*. The Court of Appeal misdirected itself on the law when it held that it is a misconception and an erroneous reading of the decision in *Hup Lee* to suggest that it supports the proposition that retrospective sanction is not possible (para [37] of the Court of Appeal's written judgment); counsel argued that that was exactly what the Court of Appeal said in *Hup Lee*.

[9] It was also argued that the liquidator is a creature of statute and as such, it only has powers conferred by statute. There is no power given to a liquidator to grant retrospective sanction. This is a pure question of law and the Court of Appeal erred in seeking to distinguish *Hup Lee*. The Court of Appeal erred in holding that the circumstances of the case dictated the interpretation of the statute, especially where the power to grant retrospective sanction must be created by statute.

[10] The fact that the notice of appeal was filed in the High Court makes no difference. The forum for testing the validity of the notice of appeal in the Court of Appeal and not the High Court. At any rate, whatever may be the position in other jurisdictions, the Federal Court decision in *Winstech* which approved *Hup Lee* is the binding and final authority on this issue. Accordingly,

question 1 should be answered in the negative.

THE RESPONDENT'S SUBMISSION

[11] In reply, learned counsel for the respondent/plaintiff argued that the original sanction granted for the High Court proceedings including the filing of the notice of appeal in the High Court; that the filing of the notice of appeal was a continuation of the proceedings in the High Court.

[12] The plaintiff applied to the liquidator for the sanction on 27 December 2017; a day prior to the deadline for the filing of the notice of appeal which fell on 28 December 2017.

[13] Learned counsel argued that the liquidator had the power to grant the sanction retrospectively. The plaintiff did not make any formal application to court for the sanction because the sanction granted by the liquidator was sufficient.

[14] Question 1 presupposes that the liquidator has the power to grant retrospective sanction. In this case, the 1965 Act applies because the plaintiff was wound up prior to the 2016 Act. The Federal Court's remarks in *Winstech* at para [23] that '... there is therefore no material before this Court to consider and to justify a grant of a *nunc pro tunc* leave', should not be taken out of context. The clear provision in s 236(2)(a) of the 1965 Act and s 486 of the 2016 Act authorises the liquidator to grant sanction. It is only when the liquidator refuses or that the application for sanction is made to court at the first instance or on appeal that the court has to weigh the grounds for the said application particularly if it is to have retrospective effect.

[15] The recent Court of Appeal decision in *Reebok (M) Sdn Bhd v CIMB Bank Bhd* [2018] MLJU 1116; [2018] 1 LNS 1186 (CA) is on all fours with this case. In *Reebok*, the Court of Appeal distinguished *Winstech* and held that s 236 of the 1965 Act does not strictly prohibit an interested party in the company to file a notice of appeal to preserve the right to appeal at the time the decision was made in a civil action. If there is an irregularity, it may be cured by order of court for two reasons — (a) in practice, it takes more than a month for the liquidator to provide sanction; and (b) it is mandatory for appeal from the High Court to be filed within a month of the decision. The Court of Appeal in *Reebok* also held that *Winstech* cannot be an authority to suggest a retrospective sanction is bad in law. At any rate, *Winstech* relate to court proceedings and not to the filing of a notice of appeal as in this case.

[16] Learned counsel also argued that there is no express provision under s 236(2)(a) of the 1965 Act prohibiting the liquidator from granting retrospective sanction. It is incorrect to say that only prospective sanction can be given under s 236.

PRINCIPLES UNDERLYING THE REQUIREMENT FOR SANCTION

[17] In the case of an undischarged bankrupt, the sanction of the Director General of Insolvency ('DGI') is required in order for the bankrupt to maintain any action or proceeding (other than an action for damages in personal injury claims) — s 38(1)(a) of the Insolvency Act 1967. This rule restricting the conduct of an undischarged bankrupt is meant for the protection of his creditor's interest and those dealing with him so as to maintain the commercial morality of his dealings. The underlying rationale for a bankrupt's disabilities and disqualifications was expressed in the following manner in *Khoo's Law and Practice of Bankruptcy in Malaysia* (2nd Ed) at p 1:

> When a person becomes a bankrupt, he obtains protection from legal proceedings by his creditors subject to certain exceptions. However, he is subject to certain disabilities and disqualifications primarily aimed at preventing him from incurring further debts ...
>
> The objective of the bankruptcy process is that, since the debtor is unable to satisfy all his debts, his assets should be shared fairly and equitably among his creditors ...

[18] In *Tan Wee Hun v Inchape Equatron (M) Sdn Bhd* [1998] 5 CLJ 769, the court observed that:

> The object of the Bankruptcy Act is to protect the public from irresponsible businessmen who transact business when they know they do not have the financial capacity to meet their payment obligations.

[19] More importantly, the underlying principle for the requirement of a sanction is that if a bankrupt is allowed to continue with an action, he would not be able to pay costs should his action be dismissed. This would leave the defendant in a disadvantaged position; in that the defendant being compelled to defend the claim will be unable to recover costs if the bankrupt's claim is dismissed.

[20] Similarly, if a company is wound up by an order of court, the board of directors becomes functus officio. The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company. A creditor or contributory cannot commence or continue with any action in the name of the wound up company. Accordingly, if a creditor or contributory of the wound up company wishes to bring or proceed with an action, the creditor or contributory must apply to the liquidator for his

sanction to do so. In order to ensure that the defendant is not prejudiced in the event that the wound up company's action is dismissed, the liquidators usually imposes conditions (such as indemnities and guarantees) which must be satisfied by the creditor or contributory, as the case may be, before the sanction is given.

OUR DECISION

[21] At the outset, it is important to appreciate that there are two different and distinct fact situations under which leave of the court or sanction of the liquidator is required. The first is in respect of action or proceeding *against* a wound up company. This situation is governed by s 226(3) of the 1965 Act/s 471(1) of the 2016 Act which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound up company. The second scenario is where action or proceeding is taken *by* a wound up company: s 236(2)(a) and (3) of the 1965 Act/s 486 of the 2016 Act read together with Part I of the Twelfth Schedule which requires the sanction of the liquidator to be obtained. The factual matrix in this appeal falls under the latter scenario.

[22] Question 1 involves the issue of the validity of a retrospective sanction which was granted by a liquidator without leave *nunc pro tunc* obtained from the court. It will be apparent that in the cases cited by the parties in this appeal, the Latin words *nunc pro tunc* takes on a certain significance.

[23] According to *Words, Phrases & Maxims (Legally & Judicially Defined)* (Vol 11, Anandan Krishnan, LexisNexis), *nunc pro tunc* literally means 'now and then'. The court will in certain cases allow a proceeding to be treated as being taken on a particular date, although as a matter of fact not completed until afterwards: Where this is done the proceeding is said to be taken *nunc pro tunc*. The applicability of the rule of *nunc pro tunc* which is really based on the maxim *actus curiae neminem gravabiti* is confined to those cases only in which some hardship would be visited upon a party, without any fault of his unless he were relieved from it by allowing a proceeding as to be taken now for then. When an order is signed *nunc pro tunc* as of a specified date, it means that a thing is now done which should have been done on the specified date.

[24] In this appeal, the question of law is whether in the particular circumstances of this case the retrospective sanction under s 236(2)(a) of the 1965 Act is valid and effective as it was given by the liquidator without the plaintiff having obtained the court's leave *nunc pro tunc*. Section 236 of the 1965 Act and s 486 and Part I of the Twelfth Schedule of the 2016 Act are as follows:

Section 236 of the 1965

A Act Powers of the liquidator

(1) ...

(2) The liquidator may —

(a) bring or defend any action or other legal proceeding in the name and on behalf
B of the company;

(b)–(j) ...

(3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

C Section 486 of the 2016 Act

486 Powers of liquidator in winding up by Court

(1) Where a company is being wound up by the Court, the liquidator may —

D (a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and

(b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.

(2) The exercise by the liquidator in a winding up by the Court of the powers
E conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Part I Twelfth Schedule of the 2016 Act

Powers exercisable without authority

F The liquidator may —

(a) bring or defend any action or other legal proceedings in the name and on behalf of the company;

(b)–(l)...

G

[25] The general rule is that once a company has been wound up by an order of the court, the *locus standi* to bring or proceed with an action or proceedings is vested in the liquidator. This principle has been enunciated in a line of Federal Court and the Court of Appeal decisions. We will take the decisions in
H chronological order.

[26] In *Zaitun* (FC) (2010), the plaintiff company commenced a suit against the defendant in 1999. In 2004, the plaintiff was compulsorily wound up by the court. Subsequently, the DGI gave consent to one KHI a former director of
I the plaintiff to engage solicitors to continue with the action against the defendant. KHI was not a contributory or creditor of the plaintiff. The solicitors applied for a Mareva injunction against the defendant. The defendant resisted the application on the primary ground that the DGI had not obtained the leave of court or the committee of inspection under s 236(1)(e) of the 1965

Act before consenting to the appointment of the solicitors. The High Court judge dismissed the application on, inter alia, the basis that the appointment of the solicitors by a liquidator had to be under s 236(1)(e) with the prior authority of the court or the committee of inspection. The question of law before the Federal Court was whether the official receiver/liquidator can appoint an advocate and solicitor to bring an action or to defend an action solely by relying on s 236(2)(a) of the 1965 Act independent of s 236(1)(e). It was held that the liquidator may do so under s 236(2)(a) without the necessity of obtaining the leave of the court or of the committee of inspection.

[27] In *Hup Lee* (CA) (2012) at the time when the suit was commenced at the High Court in 2009 by the appellant (as the second plaintiff) against the respondent, the appellant was already wound up by a court order since May 2006. The appellant did not obtain any leave from the court or the liquidator prior to the filing of the suit. Unconditional leave was only obtained in March 2011, after the appellant had fulfilled the requirements imposed by the liquidator. Meanwhile, in February 2011 the defendant had filed an application to strike out the appellant's claim on the principal ground that the appellant being a wound up company had failed to obtain leave of the court before commencing the action under s 226(3) of the 1965 Act. The defendant's striking out application was allowed by the High Court in July 2011. On appeal, the Court of Appeal held that that the issue of obtaining leave from the court under s 226(3) does not arise because this is not a case where an action was brought against the wound up company. Instead, the relevant provision applicable is sub-ss 233(1) and (2) of the 1965 Act — that once a limited company is wound up, its assets and liabilities vests in the liquidator. As such, only the liquidator has the necessary locus standi to commence the action on behalf of the appellant company against the respondent. An action filed without the consent of the liquidator or the leave of the court is illegal and invalid. Section 236(2) of the 1965 Act strengthens the position that only the liquidator has the power to bring or defend any action or legal proceedings in the name and on behalf of the wound up company. If for whatever reason the liquidator is unwilling to initiate the action in the name of the wound up company, a creditor or a contributory can apply to court under ss 236(3) or 279 of the 1965 seeking an order that the liquidator be compelled to initiate the action in the name of the wound up company or that leave be given to the creditor or contributory to bring the action in the name of the company; and that to do so, the creditor or contributory must have obtained leave of the court before commencing the action in the name and on behalf of the wound up company. In that case, the appellant had commenced the suit without the knowledge of the liquidator. The appellant cannot commence the action and then later, after objections raised by the respondent, apply for sanction from the liquidator. There are no provisions of law to authorise that sanction of the liquidator is to have retrospective effect. The appellant lacks locus standi right from the time when the action was filed. Therefore, the action was invalid and

A void ab initio. Subsequent sanction which came more than two years later cannot legalise or validate an action which was invalid and void ab initio.

[28] The question whether the sanction by the official receiver had retrospective effect so as to validate an application for leave to appeal to the Federal Court which was filed prior to the issuance of the sanction came up for determination before the Federal Court in *Winstech* (FC) (2014). In that case, the applicant company was wound up in 2010 and the official receiver was appointed as the liquidator. In May 2013, the applicant applied for leave to appeal to the Federal Court without obtaining the sanction from the liquidator. Sanction was subsequently obtained in August 2013. The respondent applied to strike out the application for leave on the ground that without the sanction of the liquidator the applicant had no *locus standi* to make the application for leave. In response, the applicant relied on s 38(1)(a) of the Bankruptcy Act 1967 ('the BA 1967') to argue that sanction was not really necessary; and that it was not a question of sanction, but rather the prerogative of the liquidator to bring any action in the name of the company under s 236(2)(a) of the 2016 Act. It was also submitted that the respondent's challenge is against the lawyer's authority to act in the proceeding rather than the issue of lack of sanction; as such, the respondent had not been prejudiced and no miscarriage of justice had occurred (*Zaitun*). The Federal Court dismissed the applicant's analogy on the applicability of the BA 1967 for two reasons. One, the facts and law in issue were not similar to found an analogy argument. Two, when a specific law has been enacted pertaining to any power or right relating to legal proceedings, that specific law shall prevail over any other similar laws, and in this case, the applicable law is the 1965 Act. The Federal Court agreed with the Court of Appeal decision in *Hup Lee* where it held that the sanction under s 236(2)(a) of the 1965 Act does not have a retrospective effect. The Federal Court also stated categorically that in appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s 236(2)(a) subject to the control and discretion of the court under sub-s 236(3). As there was no application for leave *nunc pro tunc* in that case, there was no material before the court to consider and to justify a grant of leave *nunc pro tunc*. Consequently, the applicant's application for leave to appeal to the Federal Court was struck out.

[29] In *Blackrock* (CA) (2017) the defendant applied to strike out the first and second plaintiffs' suit on, inter alia, the ground that the first plaintiff being a wound up company does not have the locus standi to institute the action. The first plaintiff had been wound up by order of court in February 2011. The suit was commenced in April 2015 without the prior sanction of the liquidator. Sanction was only obtained in June 2015, post filing of the writ and statement of claim. The High Court dismissed the defendant's application. On appeal, the Court of Appeal applying the principles enunciated in *Winstech* and *Hup*

Lee held that as the sanction was only obtained after the suit had been filed, the first plaintiff has no capacity to institute the suit. The sanction which was obtained subsequently to the filing of the suit cannot be made retrospective. A

[30] In the appeal before us, the fact that no formal application was made by the plaintiff in the Court of Appeal for leave *nunc pro tunc* is undeniable on the appeal record. What transpired in the Court of Appeal was the hearing of the defendants' application to strike out the plaintiff's appeal. Whether leave *nunc pro tunc* to ratify the retrospective sanction given by the liquidator was never in issue as there was no such application before the Court of Appeal. At the hearing in the Court of Appeal, the defendants acknowledged that in appropriate circumstances the court may grant retrospective leave *nunc pro tunc*; but that this would require a formal application by the plaintiff. However, given that there was no formal application, supported by a properly deposed affidavit the defendants argued that there was therefore no material before the Court of Appeal to consider or justly grant any *nunc pro tunc* leave. It was in this context that the Court of Appeal opined that there may be retrospective leave or sanction, or leave *nunc pro tunc* granted in appropriate cases; or even the application of the principle of ratification. The Court of Appeal went on to say that that call does not arise in this case as the sanction has already been granted by the liquidator; and that in the event that there is such a need, the circumstances are in fact ripe for a grant of retrospective leave or for a *nunc pro tunc* leave (see para [36] of the Court of Appeal's written judgment). And at para [63] of its written judgment, the Court of Appeal stated categorically that 'had there been an application for retrospective leave or leave *nunc pro tunc* sought by the appellant before us, we would have granted it unhesitatingly'. The defendant's application was dismissed on the ground that there was no merit as the liquidator had already granted the necessary retrospective sanction. The Court of Appeal cited *Reebok*, another decision of the Court of Appeal with approval. B C D E F G

[31] In *Reebok* the plaintiff company was wound up after it had commenced proceedings in the High Court. Sanction was, however given by the liquidator to the solicitors to continue with the proceedings. After the plaintiff's claim was dismissed in the High Court the plaintiff applied to the liquidator for sanction to appeal to the Court of Appeal which was subsequently granted. Whilst awaiting sanction, the solicitors had filed the notice of appeal to preserve the plaintiff's right of appeal. The defendant filed an application in the Court of Appeal to strike out the plaintiff's appeal solely on the ground that there was no sanction from the liquidator and that as such the plaintiff had no locus standi to file the appeal. The Court of Appeal dismissed the defendant's application on the grounds that issue was only a technical and not a substantive argument. The Court of Appeal held that the letter from the liquidator giving the sanction for the High Court proceedings is very wide. Section 236 does not strictly H I

prohibit an interested party in the company to file a notice of appeal to preserve the right of appeal. The issue of sanction will only be material at the date of the hearing of the appeal. If there is an irregularity, it may be cured by an order of the court; this is so for two reasons. One, in practice, it takes more than one month for the liquidator to provide sanction and two, it is mandatory for appeal from the High Court to be filed within a month of the decision. The Court of Appeal distinguished *Hup Lee*, *Winstech* and *Blackrock* on the facts. The Court of Appeal also held that *Winstech* cannot be an authority to suggest a retrospective sanction is bad in law because what the Federal Court said was that for retrospective sanction to be valid, it must be clearly stated in the letter granting the sanction. The Federal Court also considered the issue of retrospective sanction which is a well-accepted jurisprudence in many jurisdictions in winding up proceedings. At para [23] of the written judgment, the Court of Appeal said that '[t]he Companies Act as well as case laws do not permit an action to be commenced after a winding up order without first obtaining the sanction from the liquidator. If sanction has not been obtained, the commencement of the proceedings will be irregular in relation to locus standi and will have to be struck out, unless a retrospective sanction is approved by the court'.

[32] In the present case, it is therefore abundantly clear and uncontroverted that the Court of Appeal did not grant any leave *nunc pro tunc* to the plaintiff; as such, there was no order to the effect that the liquidator's sanction is deemed to have been given on the date the notice of appeal was filed by the plaintiff. Therefore, the sole issue for this court's consideration is whether the liquidator has the authority to grant a sanction which has retrospective effect. If the liquidator has, then the sanction granted, even though retrospective, is valid and effective as it relates back to the date it was supposed to have taken effect. If, however, the liquidator has not the power nor the authority, then it must follow that the sanction can only in law take effect on the date on which it was in fact granted and not on an earlier date.

[33] In our view, the Federal Court's reference to *Re Saunders* in *Winstech* must be read in its context. In *Re Saunders* Lindsay J said that retrospective leave in appropriate circumstances may be given under s 285(3) of the Insolvency Act 1986 which relates to leave to be given by the court to a creditor of a bankrupt to commence any action or legal proceedings against the bankrupt. It does not involve a situation where a bankrupt wishes to commence or continue with an action against another party. Recall that in *Winstech*, the wound up company was the applicant which applied for leave to appeal to the Federal Court without obtaining the sanction from the liquidator; as such, the primary decider is the liquidator. In contrast, in *Re Saunders*, it was the plaintiffs who applied for leave of the court to proceed against a bankrupt defendant; here, the primary decider is the court.

Accordingly, the factual matrix and the law in issue are dissimilar. For the foregoing reasons, we do not think that the analogy to *Re Saunders* is appropriate or relevant. *Re Saunders* does not support the proposition that retrospective sanction may be granted by a liquidator. As such, the Court of Appeal was under a misapprehension when it said that the Federal Court in *Winstech* acknowledged that following the English decision in *Re Saunders* that leave *nunc pro tunc* may be granted. In the same vein, the Court of Appeal in *Reebok* fell into error when it misapprehended the ratio decidendi in *Winstech*.

[34] Even though the plaintiff was faced with a one month timeline for the filing of the notice of appeal and the time lag of two months or so before obtaining the sanction from the liquidator, we do not think the plaintiff was without any remedy. In the first instance, if there were time constraints such as in this case, the plaintiff ought to have put in an urgent application to the Court of Appeal for extension of time to file the notice of appeal. In our view, an extension of time would in the normal course have been granted on proof of sufficient grounds. At the hearing before us, we asked counsel for the plaintiff whether the plaintiff could have applied to the Court of Appeal for extension of time to file the notice of appeal. Counsel answered that the plaintiff could but did not do so because they took the position that: (a) it had to file the notice of appeal within the prescribed timeline; and (b) the liquidator had the power to grant retrospective sanction. Secondly, if the sanction was given by the liquidator subsequent to the filing of the notice of appeal, the plaintiff could have made a formal application to the Court of Appeal for leave *nunc pro tunc* so as to regularise the sanction by giving it retrospective effect. Thirdly, if the liquidator refused to give his sanction, then the proper authority is the court. The plaintiff could have applied to the court under s 236(3) of the 1965 Act for the sanction, which sanction can be given retrospectively under the inherent discretion of the court.

[35] In the present case, the plaintiff did not have the locus standi when it filed the notice of appeal. The sanction given by the liquidator did not have retrospective effect. The liquidator did not have the statutory power to grant retrospective sanction in the absence of any express enabling provision in the enactment. Consequently, the notice of appeal filed by the plaintiff is bad in law and of no legal effect.

[36] We are of the view that the plaintiff's argument that the filing of the notice of appeal in the High Court is a continuation of the High Court proceedings is inconsistent with their main argument that their notice of appeal is valid because of the retrospective sanction given by the liquidator. Either the filing of the notice of appeal is covered by the original sanction for the High Court proceedings or it is not. In this respect, we agree with the submission of counsel for the defendant that the filing of the notice of appeal

in the High Court is pursuant to the Rules of the Court of Appeal; that the filing of the same in the High Court is so that the High Court judge is made aware that an appeal has been lodged against his decision. That act of filing in the High Court can have no consequence on the regularity or otherwise of the appeal. At any rate, the original sanction was confined to the suit in the High Court and it does not include an appeal therefrom. The appeal is brought in the Court of Appeal and not in the High Court. By the time the appeal was lodged, the action in the High Court had already been disposed. That is why fresh sanction must be obtained in respect of an appeal.

[37] For the foregoing reasons, we answered question 1 in the negative. As there was no application by the plaintiff to the Court of Appeal for leave *nunc pro tunc,* we declined to answer question 2. We do not think that it is appropriate to formulate a principle of law broader than is required by the precise facts to which it is to be applied.

[38] Consequently, we allowed the appeal with costs. The order of the Court of Appeal was set aside.

Appeal allowed; COA's decision set aside.

Reported by Ashok Kumar